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IN THE

# Supreme Court of the United States

October Term, 1969

No. 1566

MONROE AUTO EQUIPMENT COMPANY,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MONROE AUTO EQUIPMENT COMPANY,
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NATIONAL LABOR RELATIONS BOARD,
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---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Monroe Auto Equipment Co., Hartwell Division, Petitioner herein, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered in this case on January 29, 1970, rehearing denied March 26, 1970, granting enforcement of an order issued against the Petitioner by the National Labor Relations Board.

## OPINIONS BELOW

The Opinion of the Court of Appeals (App., infra pp. A 15 A 18) is reported at 420 F. 2d 861 (CA 5, 1969). The

findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 169 N.L.R.B. No. 16 (App., infra pp. A 32 A 36)

## JURISDICTION

The decision of the Court of Appeals was rendered on January 29, 1970. A petition for rehearing was filed on February 28, 1970 and on March 26, 1970 the Court entered an order denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended 29 U. S. C. § 160(e).

## QUESTION PRESENTED

Whether the Board and Court below are statutorily and constitutionally prohibited from predicating a current finding of a violation of the Act upon a prior violation?

## STATUTES INVOLVED

The National Labor Relations Act, as amended (61 Stat. 136; 72 Stat. 945; 73 Stat. 544; 29 U. S. C., § 141 et seq.), insofar as is pertinent herein provides:

Section 7

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through respresentatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Section 8

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Section 10

(b) Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

## STATEMENT OF THE CASE

### I.

### The Facts

The instant proceeding involves the termination of one employee, William J. Phillips, an active union adherent by the Petitioner. Phillips was reassigned to another position shortly after a representation election was held at the Petitioner's plant at which Phillips acted as an observer at the polls for the participating labor organization.

Phillips refused to accept the reassignment which did not affect his shift, seniority, rate of pay or involve more arduous working conditions, Phillips refused to accept the new job assignment and was therefore terminated.

Approximately five and one half months later a charge

was filed with the National Labor Relations Board on Phillips' behalf. Subsequent thereto a hearing was held before a duly designated Trial Examiner of the Board. (App., infra, pp. A 19 A 31)

## II.

### The Trial Examiner's Decision

The Trial Examiner after carefully considering the Petitioner's previous discrimination against union observers, *Monroe Auto Equipment Company*, 159 N.L.R.B. No. 65 and the timing of the transfer concluded:

> Nevertheless, I am in this record unable to conclude that the General Counsel has established by a preponderance of the evidence that the job transfer in question was discriminatorily motivated and that Phillips' termination which resulted when he refused to accept the new assignment was therefore violative of Sections 8(a)(3) and (1) of the Act. (App., infra, p. A 29)

## III.

### The Board's Decision and Order

The Board in reversing the Trial Examiner concluded that the Petitioner's established anti union animus[1] and the absence of any affirmative evidence concerning the reason for the transfer established a strong *prima facie* case, which the Respondent failed to rebut. (App., infra, p. A 33)

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1. In 1964 the Board found that the Petitioner violated Sections 8(a)(3) and (1) of the Act by discriminating against two union observers. Monroe Auto Equipment Company, 159 N.L.R.B. No. 65; (Enforced): 392 F. 2d 559 (CA 5, 1968).

## IV.

### The Decision of the Court of Appeals

The Court, Judge Coleman dissenting, enforced the Board's Order. The primary basis upon which the Board's Order was enforced is critical to this analysis. The Court stated:

> This case appears to be a sequel to *National Labor Relations Board v. Monroe Auto Equipment Company*, 5 Cir. 1968, 392 F. 2d 559, in more respects than merely a reference to the earlier case as relevant to our consideration of the employer's attitude towards the union. (App., infra, p. A 15)
>
> * * *
>
> We conclude that in light of the previous similar conduct by this employer in transferring two union watchers of the polls for the impermissible purpose of discriminating against them, as we found to be the case in the earlier decision, 392 F. 2d 559, . . . was for a discriminatory purpose.[2] (App., infra, p. A 18)

Judge Coleman in dissent stated:

> I think the Trial Examiner, rather than the Board, applied the current legal standard. (App., infra, p. A 18)

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2. The court also discussed the circumstances of the case, (1) Phillips' transfer without explanation; (2) the reference made about him to other employees, and (3) the pointed reference to treating union members like everybody else shortly after the election. The Petitioner is unable to understand how point (3) is a circumstance supporting the Board's decision. (App., infra, p. A 16)

## REASONS FOR GRANTING THE WRIT

### I.

**The decision of the Court below is repugnant to the due process provisions of the Fifth Amendment to the Constitution.**

We respectfully submit that the decision of a majority of the panel of the United States Court of Appeals for the Fifth Circuit is constitutionally deficient and statutorily unsound. The Petitioner, clearly recognizes the fact that the foregoing allegation is sweeping but the clear deficiencies are patently obvious. Under our system of justice which this Court has steadfastly protected "due process" has become the "battle cry" for every dissatisfied petitioner. We too are dissatisfied with the Court's opinion, as is any loser, but our dissatisfaction goes one step further, and we submit this is the critical step—the Court below has "convicted" the Petitioner based upon the premise once guilty always guilty. We readily admit that the foregoing statement, while appearing "rash," is factual as we will hereinafter illustrate.

Certain findings contained in the opening paragraph and closing paragraph of the Court's majority opinion clearly propound the thesis "once guilty always guilty."

> "This case appears to be a sequel to *National Labor Relations Board v. Monroe Auto Equipment Company*, 5 Cir. 1968, 392 F. 2d 559 in more respects than merely a reference to the earlier case as relevant to our consideration of the employer's attitude toward the union."
>
> * * *
>
> "We conclude that in light of the previous similar conduct by their employer in transferring two union watchers at the polls for the unpermissible purpose of discriminating against them, as we found to be the case in the earlier decision. 392 F. 2d 559."

In short, the majority found that due to the other "circumstances"[3] as contrasted to "evidence" that the Petitioner violated Sections 8(a)(3) and (1) of the Act.

The Trial Examiner who heard their cause could find no evidence to support a finding of a violation of the Act in any respect and recommended that the Complaint be dismissed in its entirety, Judge Coleman in his dissent agreed, stating that the "Trial Examiner, rather than the Board, *applied the correct legal standard.*" (Emphasis supplied). We respectfully submit that the Court's failure to apply the correct legal standard resulted in the issuance of a mandate constitutionally deficient as it promulgates a doctrine once guilty always guilty."

The Petitioner is unaware of any case law that would support a hypothesis "once guilty always guilty" with the single exception of the instant cause. The Board and a majority of the Court have reached a conclusion predicated upon a premise repugnant to the case law of every other Court of Appeals having reached this issue. The Board and a majority of the Court have transformed the Petitioner's prior conviction into an almost irrebuttable

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3. The circumstances referred to by the Court are as follows: (1) the alleged discriminator was transferred without explanation. The discriminator was transferred to a different job on the same shift without any loss of earnings, nor was the job more onerous. Apparently the record is devoid of any evidence that transfers are explained to the affected employee. (2) The transfer was effectuated after a reference was made to the discriminator. A foreman told another employee not to "buddy up" with the discriminator. Interestingly enough is the "feel" that the night shift superintendent advised the discriminator of his transfer. (3) Shortly after the election a reference was made to treating union members like everybody else. The Petitioner is unable to fathom how point 3 is evidence of discrimination. The Board has not taken issue with the fact that the discriminatee's "transfer," assignment to another machine, did not result in any change in hours, pay, or supervision.

evidentiary conclusion. It is this evidentiary conclusion that has deprived the Petitioner of due process. The Board with the Court's approval used the Petitioner's prior misconduct, *Monroe Auto Equipment Company*[4], to find that the Petitioner in this case was to be charged with "established anti-union animus." What is determinative is that the Board and a majority of the Court relied on "anti-union animus that was found to be the case in 1964. Therefore, the 1964 animus must have a "life span" to carry over to 1966 where the instant cause has its origin. Such a proposition clearly means once a wrongdoer always a wrongdoer. The Petitioner paid the full price for its 1964 sins, this Court should not allow a procedure to be invoked whereby the Petitioner must again in 1966 pay the "price" for its 1964 sins, such a procedure could and may well go on and on. We submit that such a procedure is constitutionally defective. The decisions of numerous other Circuits are diametrically opposed to the "evidentiary" proposition enunciated in the instant cause.

## II.

**The decision below is in conflict with decisions of the United States Court of Appeals for the Eighth Circuit.**

In *National Labor Relations Board v. Southern Transport, Inc.*, 355 F. 2d 978, 981-982 the Eighth Circuit stated:

> "We, therefore cannot hold that the adjudication of bad faith on an earlier occasion is alone substantial evidence of present bad faith to support the Board's finding. We recognize that the Board may view and consider the background of the parties and their past conduct as it relates to their management-employee practices, but findings and conclusions based on that

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4. 159 N.L.R.B. No. 65; (Enforced): 392 F. 2d 559 (CA5, 1968).

evidence alone are not sufficient for a valid order."

In our cause there is not a scintilla of evidence to show present union hostility but the Board and a majority of the Court "link up" the 1964 sins to the 1966 misconduct to achieve the final result, this we submit is constitutionally defective. In *Singer Co. v. National Labor Relations Board,* 371 F. 2d 623 (CA 8, 1967) the Board attempted to link past sins to "float" its case before the Court. The Court refused to accept such a hypothesis and denied enforcement of the Board's order:

> "In our present case, there is no evidence whatsoever of present union hostility on the part of Singer."

## III.

**The decision below is in conflict with a decision of the United States Court of Appeals for the Second Circuit.**

In *National Labor Relations Board v. Park Edge Sheridan Meats Inc.,* 341 F. 2d 725 (CA 2, 1965) the second Circuit clearly rejected the tenants and scriptures of the evidentiary proposition enunciated by a majority of the Court in the instant cause:

> "Having apparently learned a lesson from the prior proceeding, the respondents engaged an experienced labor attorney who endeavored to keep their conduct within what he considered the range permitted by law. We would not be misunderstood in saying that advice of counsel, even if precisely followed, is a defense to an unfair labor practice charge . . . .But when a party that has erred in the past places itself in the hands of capable counsel who gives reasonable advice for the future, and there is a significant improvement in its conduct, it had not been viewed as having such a propensity for sin that every episode is given the worst interpretation, or be condemned by an indis-

> criminate repetition of the phrase that its conduct 'must be assessed against the background of its earlier unfair labor practices.' * * *" Id. at 727.

## IV.

**The decision below is in conflict with a decision of the United States Court of Appeals for the Ninth Circuit.**

The majority of the Court below obviously placed primary reliance on the Petitioner's 1964 violation of the Act. This primary reliance was translated into the determinative factor in enforcing the Board's order. We respectfully submit that the foregoing procedure was statutorily unsound, and constitutionally deficient. In *National Labor Relations Board v. Mac Millan Ring-Free Oil Co.*, 394 F. 2d 26 (CA 9, 1968) the Ninth Circuit stated:

> "The nature of the Act is such that unfair labor practices depend generally upon the existence of some illicit intent, proof of which often involves inferences drawn from conduct over a long period of time. Here, for instance, much of the evidence in question antedated the charge by more than three years. Even longer delays are by no means inconceivable. When such evidence provides the principle foundation for an unfair labor practice claim, an approach which makes determinative the fact that the claim technically dates back only six months fails to deal adequately with reality. To allow primary reliance on evidence drawn from a time prior to the limitations period cannot, therefore, be reconciled with the thrust of § 10(b), . . . ."

It is all too clear that the decision of the Court below cannot be reconciled with the foregoing decision.

## V.

**The decision below is in conflict with a decision of the United States Court of Appeals for the Fourth Circuit.**

In *National Labor Relations Board v. Stevensen Brick & Block Co.*, 393 F. 2d 234, (CA 4, 1968) Judge Sobelof held:

> The Trial Examiner further predicated his decision upon the employer's unfair labor practicies committed more than seven months before the bargaining sessions began. Such remote conduct has little probative value in determining the employer's bargaining intentions. Their misconduct cannot, therefore, support the charge of refusing to bargain in violation of Section 8(a)(5) without some showing of bad faith at the negotiations themselves. As indicated above, no such showing has been made.

There is little the Petitioner can add to Judge Sobelof's pronouncements except that it is clear that they cannot be reconciled with the majority opinion below in this cause. Distinctions may be based upon triviality and irrelevant points but in the final analysis the above case and the aforementioned cases cannot be reconciled with the decision below. We submit that this is due to two basic reasons, one that the decision below is statutorily unsound and secondly, constitutionally deficient.

## VI.

**The decision below is in conflict with a decision of the United States Court of Appeals for the Sixth Circuit.**

In *Metropolitan Life Insurance Company v. National Labor Relations Board*, 371 F. 2d 573 (CA 6, 1967) the Sixth Circuit held:

> "The burden is not met by showing that the em-

ployer had been convicted of violations of the National Labor Relations Act or was at one time hostile to the union. N.L.R.B. v. Murray Ohio Mfg. Co., 328 F. 2d 613 (CA 6, 1964).

* * *

"Such motivation cannot be inferred from testimony of events occurring more than six months to the filing of the complaint where such testimony 'seems to cloak with illegality that which was otherwise lawful.' " Id. at 580.

The Court below enveloped the Petitioner with the "cloak of illegality" based on misconduct almost two years old.

## VII.

**The decision below is repugnant to this Court's decision in Local Lodge No. 1424 v. National Labor Relations Board, 362 U. S. 411 (1960).**

We earnestly submit that the Board and Court's use of the Petitioner's 1964 violation to convict the Petitioner in 1966 is unsound. The Petitioner paid the price for its sins, abided by the Court's order, there is no dispute as to this point, but was again convicted in 1966 based upon an evidentiary proposition which resurrected the 1964 transgressions coupled them to the 1966 events in order to find a violation. Such syllogistic reasoning violates both the principle and spirit of this Court decision in *Local Lodge No. 1424 v. National Labor Relations Board,* 362 U. S. 411 (1960). The entire foundation of this cause is bottomed upon the Petitioner's 1964 transgressions, a proposition which is statutorily, legislatively and constitutionally unsound. Judge Gibson, writing for the Eighth Circuit'

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5. N.L.R.B. v. Southern Transport, Inc., 355 F. 2d 978 (CA 8, 1966).

cogently stated the proposition we urgently beseech this Court to accept in this cause:

> "This reasoning is not only objectionable as presuming illegal conduct on the part of the respondent, it is fallacious in assuming a party once adjudicated in bad faith remains so . . . .
>
> * * *
>
> "Furthermore, the proposition that a prior adjudication of bad faith will alone support a finding that a demand, otherwise lawful, was made in the present instance in bad faith is unacceptable to our standards of justice."

Judge Gibson clearly pointed out the Petitioner's 1964 adjudication should not be used as an all encompassing cloak of illegality to transform the Petitioner's every act into a statutory transgression:

> "Not only is this past adjudication lacking in proper probative value, but if the Board were to be upheld on this point, one adjudication of bad faith would place the burden on a party to thereafter prove the good faith of all his future activies."

The vice of the instant cause was cogently described by Judge Gibson when he stated:

> In addition, if one adjudication were sufficient evidence to support any future findings of bad faith, the Board would thereafter be armed with all the evidence necessary to sustain the position in future holdings against this party. The Courts would be virtually removed from the scene, and the party, deprived of judicial protection, would thereafter be at the mercy of an over-zealous Board.

## CONCLUSION

The question presented herein is not one of substantial evidence, it is far more. It poses the question of whether

the Board with the approval of a majority of the Court below can invoke an evidentiary proposition alien to our jurisprudential system. The Board and the Court below did not merely view and consider the background of the Petitioner they transformed our prior transgression into an evidentiary proposition of sufficient magnitude to convict the Petitioner on the basis of a prior wrongdoing. Such a proposition is statutorily unsound and constitutionally deficient in that it violates the due process provisions of the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

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**CERTIFICATE**

Copies mailed to the Solicitor General and General Counsel as per certificate of Service on file.

## APPENDIX

## DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**In The**

**United States Court of Appeals**
**For the Fifth Circuit**

No. 27430

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

versus

MONROE AUTO EQUIPMENT CO., HARTWELL DIVISION,
*Respondent.*

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*Application for Enforcement of an Order of the National Labor Relations Board (Georgia Case)*

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(December 29, 1969)

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Before TUTTLE, COLEMAN and SIMPSON.

TUTTLE, Circuit Judge: This case appears to be a sequel to *National Labor Relations Board v. Monroe Auto Equipment Company,* 5 Cir. 1968, 392 F. 2d 559, in more respects than merely a reference to the earlier case as relevant to our consideration of the employer's attitude towards the union. In the earlier case this court affirmed the Labor Board's decision, which in turn adopted and affirmed the trial examiner's findings and recommendations that Monroe had been guilty of violating Section 8(a) (3) of the National Labor Relations Act by transferring for

dscriminatory purposes two employees who had been union observers at a representation election.

This case also arises because Monroe transferred an employee, William J. Phillips, who had been working for the company for more than five years, without notice and without assigning any reason for the action, during the month following his acting as one of two union observers during an election which the union won in March, 1966.

There is no dispute that Phillips was very active in the campaign for the union, and, following the election, he solicited many employees and was successful in obtaining about one hundred signed union membership cards.

The facts as found by the trial examiner included the following: About three days after the election, foreman James Smith told an operator of a machine located near Phillips' work station, Furman Whitworth, not to "buddy up with [Phillips] anymore." Foreman Smith received instructions from his superiors that if Phillips was "caught loafing on the job to go through the regular procedure as [he] would any other one." Smith also received similar instructions in regard to several other employees when Superintendent Benny Reed told Smith to "watch all [the union people] and to get rid of the union people as well as other people if they got out of step, not to be scared to discipline them." Thereafter, an employee named Cole, who had been operating a rewelding machine, was given instructions on Phillips' machine, and on April 22, 1966, the night superintendent told Phillips that he was being transferred that night to operate Cole's machines. These were rewelding machines and were unlike those which Phillips had been working on. Phillips objected, and, the conversation being near the end of the week, he was given

until the following Monday to make the transfer. On Monday Phillips reported for work and was told to run Cole's rewelding machine. He objected, but the plant superintendent said that this was all they had for him and if he did not want the job the company would have to discharge him.

The company, of course, contends that the power to transfer employees freely, especially if there is no reduction in pay and no other hardships involved, which might justify a grievance of any kind, which was the case here, is the management's prerogative that cannot be the basis of a charge of discrimination. This is too broad a statement of the principle. No citation of authority is needed to restate the proposition that management prerogatives may be exercised freely, up to and including a discharge. On the other hand, it is too well known for the citation of authority to state that the management's prerogative to effect a discharge cannot be exercised if done for the illegal purpose of discriminating against an employee on account of protected activity. The company does not seriously challenge the proposition that Phillips was, in fact, being transferred to a machine with which he was unfamiliar in order to discipline him for having engaged in union activities, this would amount to a violation of Section 8(a) (3). The causal connection between his refusal to accept such a transfer under those circumstances and his being discharged for failure to make the transfer is too clear to need any further proof of causation.

The employer stresses the fact that on the facts as found by the examiner, all of which were accepted and adopted by the Board, the examiner concluded that the transfer was not "pretextual" for the purpose of causing Phillips to refuse the transfer and thus be subjected to

being fired. However, it is the Board's decision, not the examiner's, that we are required to review on a petition to enforce.

We conclude that in light of the previous similar conduct by this employer in transferring two union watchers at the polls for the impermissible purpose of discriminating against them, as we found to be the case in the earlier decision, 392 F. 2d 559, and in light of the other circumstances related above, we cannot conclude that there was not substantial evidence on the record as a whole to support the Board's finding that the conduct of the employer in transferring Phillips, without explanation, and after the reference was made about him to other employees and the pointed reference to treating union members like everybody else so shortly after the election was for a discriminatory purpose.

The order will be ENFORCED.

COLEMAN, Circuit Judge, dissenting.

I respectfully dissent.

The disgruntled employee was transferred to another job on the *same* shift and with the *same* pay. This was hardly discriminatory, unless an employee has a right to choose his work regardless of the needs or wishes of his employer. The effect of the majority decision, I fear, is that an employer cannot manage the internal operations of his shop if he has committed an unfair labor practice in some other instance. This is beyond the intent of the Act. I think the Trial Examiner, rather than the Board, applied the correct legal standard

With deference, I would deny enforcement.

## TRIAL EXAMINER'S DECISION

### Statement of the Case

*JOHN P. von ROHR*, Trial Examiner: Upon a charge filed on October 14, 1966, the General Counsel of the National Labor Relations Board, by the Regional Director for Region Ten (Atlanta, Georgia) issued a complaint on December 9, 1966, against Monroe Auto Equipment Company, Hartwell Division, herein called the Respondent or the Company, alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Thereafter the Respondent filed an answer denying the allegations of unlawful conduct allged in the complaint.

Pursuant to notice, a hearing was held before Trial Examiner John P von Rohr in Hartwell, Georgia on February 9 and March 30, 1967. All parties were represented by counsel and were afforded opportunity to adduce evidence, to examine and cross-examine witnesses and to file briefs. Briefs have been received from the General Counsel and the Respondent and they have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

### Finding of Facts and Conclusions

### I. The business of the Respondent

The Respondent is a Michigan corporation with an office and place of business located in Hartwell, Georgia where it is engaged in the manufacture, sale and distribution of automotive shock absorbers and related products. During the 12 months preceding the hearing herein the respondent

sold and shipped finished products valued in excess of $50,000 from its plant in Hartwell, Georgia directly to customers located at points and places outside the State of Georgia.

The Respondent concedes, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. The labor organization involved

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

## III. The Alleged Unfair Labor Practices

### A. *The Issue; Background*

The sole issue in this case is whether employee William J. Phillips was discriminatorily terminated on April 25, 1966, for refusing to accept a transfer to another job. This involved a transfer from one type of production machine to another machine on the same shift under the same foreman and at the same rate of pay. There is no allegation or evidence that acceptance of the transfer would involve less desirable working conditions or work of a more arduous nature.

There is no allegation or evidence of any independent violations of Section 8(a)(1) of the Act by the Respondent in the instant case. As a basis for showing anti-union hostility in support of the alleged Section 8(a)(3) violation in this case, the General Counsel relies heavily upon a previous Board decision against this same Respondent as reported in *Monroe Auto Equipment Company*, 159 NLRB

No. 65. The events in the latter case arose out of an organizing campaign by the Charging Union beginning in the middle of 1963, which culminated with the Union's loss of a Board-conducted election on July 23 and 24, 1964.[1] Insofar as pertinent here, the Board in the cited case upheld the Trial Examiner's finding that: (1) the Company discriminatorily transferred an employee who had acted as a union observer in the election to a more arduous and disagreeable job; and that it later constructively discharged this employee in violation of Section 8(a)(3) of the Act by forcing his resignation in returning him to that job when he reported back to work after a severe illness; (2) that the Company discriminated against another employee who also acted as Union observer to the election by giving him a 7 day suspension allegedly for failing to obey an order to clean up his work area; and (3) that the Company did not violate the Act by its layoff of a third employee known by it to be an active union adherent.

B. *The facts*

William J. Phillips began his employment with the Respondent on June 15, 1959. He left his job in December 1960, but returned to the Company's employ in September 1961, at which time he was placed on the assembly line and worked on the third shift from 4 p.m. until 12 a.m. Two months later he was given the job of operating a baffle machine and an oil seal spring machine on the same shift. He continued on this job until the spring of 1964, at which time he requested and was granted a transfer to a job in the shipping department on the day shift. After working in this position for approximately 5 months, Phillips was requested by the foreman and by the superintendent of the

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1. This election was subsequently set aside by the Board.

night shift to return to his former job of operating the baffle spring machine and oil spring machine on that shift, this apparently for the reason that the Company was having difficulty in finding a replacement for Phillips when he left that job. Although it appears that Phillips at first was unwilling to return to his former job on the night shift, he finally did so when promised an hourly 10 cent wage increase. Phillips was granted this increase, but in order to conform with the established rate schedule the Respondent found it necessary to change his job classification to that of a repairman. He had not been so classified when he worked on these machines from November 1961 to the spring of 1964.

A second election was held at Respondent's plant on March 3 and 4, 1966. Phillips and another employee acted as observers for the Union on both days.[2] Following the election, which the Union won, he solicited employees to sign union membership cards. According to Phillips, "after the election I got around 100, 125, somewhere in that neighborhood. I don't remember . . . 150, I don't remember just how many." There is no evidence that this activity came to Respondent's attention.

Curtis Bickery, in Respondent's employ as a tool and die maker for 8 years, testified without contradiction that on the "night of the election" he was instructed by Thurston Bickery, his foreman, to report to him any occasion when he was called to make repairs on the machines which Phillips operated. Employee Bickery said that the foreman advised him that an any such occasion "he (the fore-

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2. Phillips testified that about 2 weeks prior to the election he campaigned "strongly" for the Union. There is, however, no evidence of company knowledge of any such activities.

man) would like to go back there with me." Bickery testified that he had never before received similar instructions as to any other employee. Bickery said that he subsequently had three or four occasions to make repairs on Phillips' machines and that I should be transferred off my job. But he went ahead.[3]

Testifying also for the General Counsel was Furman Whitworth, an employee who operated a machine about 15 feet from Phillips' work station. Whitworth and Phillips both worked on the same shift under James Smith (also called Ed Smith), the foreman of department 13. Whitworth testified without contradition that about 3 days after the election foreman Smtih told him that "I shouldn't buddy up with William Phillips any more."

Although Foreman James Smith was hospitalized at the time of Phillips' termination, Smith was called by the General Counsel and queried as to whether he had received any special instructions after the election from Bennie Reed, the general foreman on the night shift, concerning Phillips.[4] Smith responded that he did receive instructions, these to the effect that "if he couldn't do his job and if he was caught loafing on the job to go through the regular procedure as I would any other one." However, Smith testified that during the same period he received similar instructions in regard to several other employees. When Smith was asked if he received specific instructions con-

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3. It appears that these were routine repairs, the type of which commonly involved all production machinery.

4. Smith was no longer in Respondent's employ at the time of the haering. Refusing at first to comply with a subpoena issued by the General Counsel, he did not testify until enforcement of the subpoena was granted by a United States District Court.

cerning the disciplining of union people, Smith responded, "I recall that Mr. Reed told me to—that I would have to watch all of these people and to get rid of the union people as well as other people if they got out of step, not to be scared to discipline them."

I turn now to the event of Phillips' termination. Upon reporting to work on April 22, 1966, a Friday, Phillips was advised by Bennie Reed, the night superintendent, that he was being transferred to operate a rewelding machine which was located in another area of the same department. As noted more fully hereinafter, this machine had been operated by an employee named Cole. As will also be noted, Cole had been receiving training concerning the operation of Phillips' oil seal spring machine and baffle spring machine. Thus, it was Reed's plan simply to transfer Cole and Phillips to each other's respective jobs at no change in hours, supervision or rate of pay. In any event, upon being apprized that he was being shifted to Cole's machine and that Cole would assume his job, Phillips asked how long the transfer would remain in effect. Reed suggested that they take the matter up the Grover Dudley, the plant superintendent, they thereupon went to see Dudley. Concerning the conversation which ensued, Phillips testified "Dudley said it was his idea to transfer me and I'd have to take this job. And I told him I didn't think it was right if I kept my job up. And I asked Grover how long and he wouldn't tell me for how long it would be." At Phillips' request, Phillips, Reed and Dudley thereupon went to Charles Gordon, the plant manager. Phillips' testimony conserning this conversation was partly fragmentory and one particular aspect of it, as I shall later point out, was somewhat hazy and confusing. However, his first and most comprehensive account of this conversation was as follows:

"We went to him [Charles Gordon] and he told Mr. Dudley to put me back in the same area I was in repairing shocks that night and tell me to watch Cole, he was the fellow taking my job over that night. And if anything went wrong with machines for me to fix them. He told Mr. Dudley that he wanted me to work in that department right around that area. Just give me a job back there repairing shock.

But Mr. Dudley said he didn't have enough repairmen. Mr. Gordon told him to move one up, make another repairman and give me that job back there. But, then Mr. Gordon told Mr. Dudley to put me back there just for that night, that they'd transfer me on Monday.

And I told them this wasn't right. And I didn't think I should be transferred off my job. But he went ahead. I went back on that job that night and in the meantime Mr. Gordon he jumped up and slapped the desk and kind of said a little cuss word and said he run the plant and I'd do like he said to do. And I told him I didn't have to do like he said to do if I was right. So, anyway, I went on back on the job that he wanted me to go on that night."

Later in his direct testimony Phillips said that Gordon advised him that "they were just going to move me around and learn me all the jobs." He stated however, that Gordon did not say that the transfer could lead to a promotion.[5] On cross-examination Phillips testified that at one point he told Gordon that he would refuse to accept the transfer, whereupon Gordon stated that he (Phillips) would have until Monday to think it over. Phillips testi-

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5. On several occasions previously Phillips had requested a transfer to higher paying jobs. Phillips said these requests were refused because "they always said it would cost the company too much money to move me."

fied also that, "He (Gordon) said I'd be expected to take the new job [on Monday] that they had offered me." Phillips also testified on cross that he told some of the employees, upon returning to his work station from Gordon's office, that he would not accept the transfer.

Following the weekend, Phillips reported to his regular work station on Monday. He was met by Bob Isbell, the assistant foreman who was acting in the place of hospitalized Foreman Smith. Isbell told him to go "up in front" to Cole's machine. Phillips thereupon went to Dudley. Dudley asked if Isbell had not give him instructions. According to Phillips, he answered in the affirmative but he thereupon told Dudley, "I reckon I was going to do the job you wanted me to do on Friday." Phillips said that Dudley then told him to see Isbell again. He did so and Isbell again advised him that he should "run Cole's job." Phillips at this point sought out Dudley and Reed. Phillips testified that "they told me that's all they had for me and if I didn't want that they'd just have to discharge me." Pursuant to Gordon's instructions, Reed thereupon wrote up a discharge slip which stated as the reason for discharge "Reason, refused to run assigned job." Phillips testified that at his insistance the two foremen then took him to see Gordon. Gordon told Phillips that "what Dudley said went . . . if I was discharged I was discharged." With this Phillips was terminated.

The Respondent did not call any of the supervisors who participated in the decision to transfer Phillips from one machine to another to explain the reason or basis for taking this action at this particular time. Plant Manager Gordon, when called by the Respondent, testified only that Phillips was terminated because he refused to do the job

assigned to him.[6] However, Foreman Smith testified to an incident which he said gave rise to the initial decision to train employee Cole in the operation of Phillips' machine. Thus, Smith testified that one evening, at some point following the election, it was ascertained that Phillips had produced 1,000 defective springs.[7] He said that Plant Superintendent Dudley took the matter up with him and instructed that he train another employee to learn the operation of the spring machines. Smith testified that it was he who suggested that employee Cole be so selected. As noted heretofore, Cole, who worked on the night shift, came in several hours early to receive this training. Although Cole received his instructions from the day shift operator, Phillips testified that he was aware that Cole was receiving this training. He said that he first observed this about 1½ months prior to his termination.

Smith testified that Dudley told him to train another employee for Phillips' jobs because "he [Dudley] felt that Mr. Phillips was hindering our production or trying to hinder our production." He said, however, that Dudley did not give him any further instructions concerning the

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6. Gordon also testified that six repairmen were assigned to the assembly line on each shift and that it was the policy of the Company to rotate them. He said that this decision is up to the foreman and that "if a man is weak in this point he will move a man into that area to strengthen that particular segment of the line." He testified further that Phillips' job was within the repairman classification, although he did not explain why Phillips was not classified as a repairman when he initially operated the spring machines. As previously noted, Phillips was given the repairman classification when he transferred to the night shift in 1964. It may be noted that Phillips' duties also entailed the changing of parts on the machine when the line changed from one production job to another; further, Phillips also performed the job of repairing shock absorbers.

7. The spring is a part which is later assembled into the shock absorber.

transfer of Phillips, although he testified that he assumed Phillips ultimately would be transferred "because we never have two people on one machine or one job."[8]

The foregoing has been set forth as the only disclosure in the record as background for Respondent's decision to transfer Phillips from one job to another. It is clear that the incident of the defective springs in itself did not play any part in Phillips' ultimate termination nor does Respondent assert it as a reason therefor. However, I think it proper to note that the evidence strongly suggests that Phillips was not at fault for the production of the defective springs. Thus, not only was he not given any warning or reprimand therefor, but Smith conceded that the defective parts were produced as the result of a broken part in the machine.[9]

### C. *Conclusions*

The circumstances of Respondent's tool and die foreman instructing a tool and die employee to report any work orders for repairs on Phillips' machines and the remark of Foreman Smith to employee Whitworth that he should not "buddy up with Phillips any more," both of which occurred at or following the day of the election wherein

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8. It may be reiterated here that Smith was not present when this decision was implemented or when Phillips was terminated.

9. The defective springs were discovered by the line inspector in the course of his duties. The 1,000 defective parts were produced during a period of ½ hour. Smith testified that the operator is also responsible for checking the springs with hand guages. According to Smith, Phillips should have made such a check every 15 minutes and had he done so the error would have been corrected earlier. However, Phillips credibly testified that he was never given any specific time within which to make such a check. The defect in question, it may be noted, was not visible to the naked eye.

Phillips acted as a union observer, give rise to suspicion that these incidents were prompted by anti-union considerations. This is particularly true when considered against the background of Respondent's discrimination against the union observers in the preceding case, to which reference has previously been made. Nevertheless, I am on this record unable to conclude that the General Counsel has established by a preponderance of the evidence that the job transfer in question was discriminatorily motivated and that Phillips' termination which resulted when he refused to accept the new assignment was therefore violative of Section 8(a)(3) and (1) of the Act.

The timing of events in cases of this nature are almost always an important consideration in determining issues of alleged discrimination. Here, the proposed transfer of Phillips took place approximately 7 weeks following the election. But also following the election occurred the incident wherein Phillips produced the 1000 defective parts. Assuming that Phillips was not at fault in producing the defective parts, the fact remains that the incident did give the Respondent a tangible basis for training another employee in the operation of Phillips' machine at the time of the occurrence. The evidence does not, in my opinion, warrant an inference that this action was taken as part of a plan for later discrimination.

Aside from the foregoing, there is no evidence whatsoever, nor does the General Counsel contend, that the transfer of Phillips to the rewelding machine would cause any hardship to this employee. This job was on the same shift and in the same department in which he was working. It involved the same rate of pay and came under the same supervision as his job on the baffle and oil spring machines. Indeed, Phillips admitted that he refused to ac-

cept the transfer without ever knowing what the new job was about.[10] As to this reason for refusing the transfer, Phillips testified, "and after the union election this soon I thought, I felt, it [the transfer] was discrimination to me."[11] In the absence of preponderant proof that the transfer was discriminatorily motivated, the assumption must lie that the transfer was based upon legitimate business considerations.[12] The fact that Phillips was a union adherent and acted as a union observer did not give him a vested interest in his job.

In his brief, the General Counsel argues as follows: "By transferring Phillips, Respondent created a situation where Phillips was placed in a job he knew nothing about, after being uprooted from a job with which he was thoroughly familiar. The way was then open for Respondent to bear down on Phillips and to further discipline him for the slightest mistake—a mistake which most probably [would occur] because of Phillips' unfamiliarity with the job." Of

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10. Thus, Phillips testified that he had never observed the rewelding machine in operation and that he made no inquiry as to the nature of the job at the time of the proposed assignment.

11. He also testified, "I didn't have any training for the [new] job and I liked the job that I was on so why move me then?"

12. Although I have some reservations over the fact that Respondent did not call witnesses to explain the reason for the transfer, on the entire record I nevertheless am impelled to conclude that the General Counsel did not make a prima facie case to establish that the transfer was made for anti-union reasons. Additionally, and although Phillips' testimony was somewhat confused on the point, it appears from his own testimony, as heretofore set forth, that when he protested the transfer to Plant Manager Gordon, Gordon attempted to persuade Plant Superintendent Dudley to transfer another repairman to Cole's job and let Phillips remain in his old job. According to Phillips, Dudley responded that he did not have enough repairmen—and Gordon thereupon upheld the superintendent's decision. While not of itself conclusive, this is further evidence that the tranfer was not made for discriminatory reasons.

course, this is sheer speculation. A finding of present discrimination can hardly be based upon anticipation of possible future events. Accordingly, and for all of the reasons hereinabove set forth, I shall recommend that the complaint be dismissed in its entirety.[13]

Upon the basis of the foregoing findings of fact and on the entire record, I make the following:

## Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

/s/ John P. von Rohr
Trial Examiner

Dated at Washington, D. C.
June 8, 1967

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13. The General Counsel has cited cases in which the Board found discrimination notwithstanding that the employees involved were transferred to substantially equivalent jobs or even higher paying jobs. Not only are these cases factually distinguishable, but in each case the purpose of the transfer in itself clearly was indicative of the discrimination found. Thus, in **Southern California Associated Newspaper, d/b/a South Bay Daily Breeze**, 130 NLRB 61, the Board found that the employer violated Section 8(a)(3) of the Act where an employee was terminated for refusing to accept a promotion to a new job. However, the Board found that the reason for offering the promotion was to remove the employee from a mail room for the purpse of impeding union activity among mail room employees. Similarly, in **J. W. Mays, Inc.**, 147 NLRB 942, the discrimination found against two employees who were discharged for refusing to accept transfers from the warehouse to equally paying jobs in the general office was predicated upon a showing that the purpose for the transfer was to impede the employees' union activities in the warehouse.

*Appendix*

## DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

On June 8, 1967, Trial Examiner John P. von Rohr issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the Charging Party filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in this case, and adopts the Trial Examiner's findings, but not, for the reasons set forth below, his conclusions and recommendations.

Phillips, the discriminatee herein, has been employed by the Respondent for a total of more than five years. Before he acted as a Union observer at the Board-conducted election of March 3 and 4, 1966, the only events affecting his employment that might be characterized as out of the ordinary, were: his transfer to a job in the shipping department, at his own request, in the spring of 1964; and his acquiescence in the Respondent's request, about five months later, to return to his former job upon the promise of a 10-cent per hour wage increase.

After the election, a number of apparently unprecedented events occurred: Employee Bickery was instructed by his foreman to report any occasions when he was called to make repairs on machines Phillips operated; employee Whitworth was warned by his foreman not to "buddy up" with Phillips any more; and employee Cole began to receive training in the operation of the machines Phillips had been operating, apparently without criticism, since 1964. Thereafter, Phillips, who had been given no training in the work to which he was being assigned, was in effect instructed to exchange jobs with Cole, who had been given such training; when Phillips refused to accept his new assignment because, as he testified, he thought the transfer so soon after the election was discriminatory, he was discharged.

In our opinion, all these facts, found by the Trial Examiner, considered against the background of the Respondent's *established antiunion animus*[1] and the absence of any testimony concerning the reason for the transfer decision, establish a strong *prima facie* case of discrimination, which the Respondent has failed to rebut. We cannot agree with the Trial Examiner's conclusion that the machine malfunction, for which Phillips was not responsible and in connection with which he was neither warned nor reprimanded, was Respondent's actual reason for training another employee in a job satisfactorily performed by Phillips over an almost continuous 5-year period. If this malfunction played any part in the sequence of events that led to Phillips' termination, as foreman Smith's testimony would seem to imply, it is clear, when the training given Cole is contrasted with the absence of any training for

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1. See Monroe Auto Equipment Company, 159 NLRB 613, 622-626.

Phillips, that it was to be utilized as a cover to obfuscate the true discriminatory motive underlying the Respondent's conduct.

Accordingly, we find that the discharge of Phillips when he refused to accept the discriminatorily motivated transfer was violative of Section 8(a)(1) and (3) of the Act.

## THE REMEDY

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Phillips because he refused to accept the discriminatorily motivated transfer, we shall order the Respondent to cease and desist therefrom and to offer William J. Phillips immediate and full reinstatement of his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make Phillips whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, by payment to him of a sum of money equal to that which he would normally have earned as wages from the date of his discharge to the date of the Respondent's offer of reinstatement, less his interim earnings during said period, to which shall be added interest at the rate of 6 percent per annum, in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing and Heating Co.*, 138 NLRB 716.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Monroe Auto Equipment Company, Hartwell Division, Hartwell, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, or any other labor organization, by discriminating in regard to the hire and tenure of employees or any term or conditions of their employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer William J. Phillips immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss he may have suffered by reason of the discrimination against him, in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(b) Notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Hartwell, Georgia, place of business, copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. Jan. 12, 1968.

GERALD A. BROWN, Member
HOWARD JENKINS, JR., Member
SAM ZAGORIA, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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2. In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."